No. 3813

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

No. 3813

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

This case was brought in the District Court of Alaska by the defendant in error against the plaintiff in error to recover damages to property alleged to have been caused by a landslide that occurred on the slope of Mount Roberts near the town of Juneau, on January 2nd, 1920.

It was claimed by the defendant in error that the plaintiff in error negligently permitted water to escape from its flume maintained by it on the mountainside to convey a portion of the waters of Gold Creek, appropriated and diverted by it, to its mill, where such waters were applied to use. It was claimed that the water so escaping found its

way down the mountainside and caused a landslide, and that the landslide so caused occasioned the damage complained of.

The specific charge of negligence was that plaintiff's flume emptied into a penstock from which the water passed into a pipe, and that on the day mentioned the penstock overflowed

> "for the reason that there was more water conveyed through said flume to the said penstock than was carried away from said penstock by the distribution pipe or otherwise" * * * "that the defendant either negligently or designedly on the said 2nd day of January, 1920, prior to the injury complained of, permitted more water to flow into said flume and to be conveyed by said flume to said penstock than was taken away by the service pipe. That by constructing and maintaining a flume or conduit to confine and carry away to some safe place any water which at any time, for any reason, might be conveyed to the penstock in excess of what the service pipe would, could or did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises here in question, or otherwise occasioned damage."

It was further claimed that the defendant should have maintained such a flume and should have provided a series of spillways along this flume so that the surplus water could have been released along this flume before it reached the penstock.

The defendant denied the negligence charge and denied that any water escaped from its flume or penstock prior to the slide, and in this connection

averred that the water diverted by it, as before stated, was conveyed through a flume until it reached a point above the premises of the defendant in error where the flume emptied into a penstock from which the water was conveyed by different pipes, one of which was a small pipe which conveyed water to the power plant for boiler feed purposes; another a somewhat larger pipe which was connected with the city water mains so as to make the water available for the use of the city for fire-fighting purposes; and still another, a much larger pipe, which conveyed all the water not carried by the other two pipes to the mill tank situate in the plaintiff in error's mill. That it was necessary to install a screen in this penstock for the purpose of taking from the water such leaves and other debris as might be carried in it before the water was allowed to enter the pipes and be carried to the different point of use. That for this purpose a trommel screen, which is a type of revolving screen, was installed. That this screen was driven by an electric motor which caused it to revolve and in that manner to keep itself clean. That this motor was supplied with electric current from plaintiff in error's general electrical system. That the devices above referred to were the most approved type of devices known and were installed and maintained with the highest degree of engineering skill. That the plaintiff in error maintained a transmission line along the hillside extending across the mass that slid on the occasion referred to in the pleadings; that the

Alaska Gastineau Mining Company also maintained a transmission line along this hillside; that one of the towers on which the line of the Alaska Gastineau Company was strung stood on the mass that slid and that the transmission line of the Alaska Gastineau Company crossed the transmission lines of the plaintiff in error a short distance from the slide area.

That a short time before the mass was precipitated down the hillside it moved to such an extent that the tower of the Alaska Gastineau Company, standing upon it was set in motion, as a result of which the wires strung thereon commenced to oscillate and were, as a result thereof, brought in contact with the transmission lines of the plaintiff in error. That, as a result of this contact, a short circuit occurred which interrupted the power on plaintiff in error's system so that the motor by which the trommel screen was driven was deprived of electric current and brought to a standstill.

That another slide occurred shortly before this time at Wood's Gulch at a point above plaintiff in error's flume line, as a result of which the water then running in flume was heavily charged with leaves and other debris so that when the screen was brought to a stop the meshes filled up quickly and caused the screen to overflow and a portion of the water carried by the flume did flow over the screen and out of the spout designed to carry away the leaves and debris screened from the water.

The claim of the defendant in this connection being that no water escaped from its diverting works until after the ground had started to move, and that this movement of the ground was the direct cause that resulted in this overflow.

It was further claimed by the plaintiff in error that the slide which occasioned the damage complained of was occasioned by causes not under the control of the plaintiff in error. That one Koski had made excavations on the side of the mountain which had the effect of cutting off the toe from the mass that slid and of depriving it of lateral support; that the ground had been covered with loose snow, upon which the rain had been falling for some time past, so as to cause it to melt and soak in, thereby making the mass above heavy and slippery; and that because the mass had been deprived of its support by Koski, and that because it had been made both heavy and slippery by rain and melting snow, it slid down the hillside on the occasion referred to.

The plaintiff in error also denied the allegations of injury and damage set up in the complaint. The affirmative matter set up was in turn denied by the defendant in error, and upon the issue so framed the cause went to trial.

The plaintiff in error called a number of witnesses who testified that they saw, while standing in the streets of Juneau, a quantity of water coming from plaintiff in error's flume. Some testified that it came from the flume and others spoke of the pen-

stock as the point where the overflow was observed. Each and all of these witnesses, however, described the stream observed by them as being a wide stream, some placing its width at two feet or more and others estimating its width to as much as five or six feet; and each described it as being of such a character that its width, and not its depth or thickness, could be observed from the viewpoint of the witnesses.

It was shown in evidence that at a point a short distance from the penstock, snow sheds designed to protect the portal of a tunnel picked up the water flowing in a gulch and discharged the same on top of a flume built along under the eave of the snow shed in such a manner that this water flowed off from the covering built over the flume at that point with a view of keeping this water from running into this flume itself and that this water so making its appearance over the ends of the flume appeared to any one standing in the streets of Juneau, over a quarter of a mile away, as though it were water coming from the flume itself. And that the stream which so made its appearance flowed towards the town so that its width could be observed while its depth or thickness could not be seen.

It was also shown in evidence that the spout installed at the penstock for the purpose of carrying leaves and debris screened from the water, pointed in the direction of Mount Juneau and not towards the town; that it was pointed in such a manner that if water were coming from it anyone standing on

the streets of Juneau would be unable to see the width of the stream but would be looking in an edge of it, so that its width or thickness alone could be observed. The contention of the plaintiff in error being that these witnesses were simply mistaken in regard to the stream of water observed by them and that what they saw was the surface water picked up under the eave of the snow sheds and in that manner caused to spout off from the roof on the covering of the flume and not water flowing from the rubbish spout at the penstock.

The defendant in error also called one witness who testified that he passed the penstock spout at seven o'clock in the morning and that he saw a small quantity of water coming from the spout at that time. He said the quantity he saw coming from it at that time would fill a two-inch pipe, more or less. It was shown, however, that the screening device was such that when in motion a small quantity such as that testified to by the witness might momentarily escape along with a large bunch of leaves or other like material, and a large number of witnesses were called who passed by the spout of the trommel screen that morning at seven o'clock who testified that no water was coming from it. The flume tender testified that he was there at ten minutes after seven, that no water came from the spout; the track watchman said he was there at half past eight and no water was coming from the spout; another passerby testified that he was there about half past ten, and the superintendent of the com-

pany was there at about ten minutes to eleven. He testified that at that time everything was operating perfectly and no water was coming from the rubbish pile.

The mass slid down the hillside at about fifteen minutes after eleven. Shortly before that it had started to move and had brought the wires of the Alaska Gastineau Company into contact with those of the plaintiff in error in the manner claimed by the plaintiff in error. Flashes were observed on the hillside at a point where the wires crossed, the voltage chart kept on the system recorded a short circuit referred to and the testimony of witnesses established the fact that the short circuit occurred and that the power line supplying current to the trommel screen motor had gone out some five or ten minutes before the mass fully slid down the hillside. After this, the power line had gone out, as above stated, which was evidenced by the fact that the trommel screen stood still and the electric lights in the tunnel connected on this same system had been darkened. Men coming from the mine and passing this trommel screen encountered a quantity of water flowing over the screen and following the trail leading along the hogback in the direction of the slide area; others from other points of view observed water coming from this spout at the same time. The only evidence in the case that in any sense tends to prove that any water came from the diverting works of the plaintiff in error prior to the time when the ground began to move and interfere with the sup-

ply of electric current by which the motor was driven, as before stated, was the evidence of a single witness, Buzzby, who said he saw a quantity of water that would fill a two-inch pipe, more or less, coming from the spout, a quantity so small that it could not have any effect and the presence of which so observed by Buzzby at that time was amply explained by the obvious fact that such small quantities might from time to time splash over and be thrown out with the leaves and rubbish.

That this was the case is clearly evident from the fact that a large number of others passing there at about that time saw no water coming from the spout and that no water was coming over at the different times in the forenoon when the various witnesses before mentioned had occasion to visit that point.

In addition to this it may be claimed that the plaintiff produced a number of witnesses, who, as above stated, testified that they saw a quantity of water from the streets of Juneau, but that they were mistaken in the stream they testified to was made very evident; that many others who afterward learned their mistake also made the same mistake, and from the further fact that the stream they described in cross-examination was such in appearance that it could not have come from the rubbish spot at the trommel screen. However, some of these witnesses made the statement that the stream they saw came from the penstock, and to this extent, and

no further, does their testimony supply conflict of evidence upon the question of whether water was coming from the penstock prior to the time that the ground began to move. If, however, it should be said that this is a sufficient conflict in evidence to submit to the jury as to whether there was water coming out of the diverting works from the plaintiff in error prior to the time the ground began to move, it is claimed by the plaintiff in error that there is no conflict whatever upon the question of how and what caused the water to come from the penstock.

The specific act of negligence charged was that more water was brought to the penstock by the flume than the pipe leading from the penstock was able to carry away; that as a result of this the penstock overflowed; that a series of spillways should have been installed to take the water from the flume before it reached the penstock, and that a waste flume should have been installed to carry away the water that was so allowed to overflow.

The evidence conclusively showed that three pipes led from the penstock; that these three pipes had a carrying capacity twice as great as that of the flume and that it was wide open and carried the water and allowed all the water that would flow through it to empty into the mill tank, so that it would be impossible for the flume to carry to the penstock as much water as the pipe would carry away. No evidence was offered at the trial that tended to show

in any manner that more water was carried to the penstock than the pipe had or could carry away; on the other hand, it was conclusively shown that such was not the case, but that the overflow which had occurred from the rubbish spout occurred because the screen had stopped so that its meshes filled up and allowed the penstock to overflow.

There was no claim and no evidence that this screen, installed and maintained as it was, was not an official device; in fact, it was admitted by at least one of the engineers called by the defendant in error that it was the most perfect device known for that purpose and could not overflow as long as it was kept revolving.

It was also conclusively shown that the penstock referred to was not the character of device usually denominated a penstock; that is to say, it was not a device installed for the purpose of equalizing the flow and putting a uniform pressure of the water in the pipe. The pipe in this case was shown to be merely a part of the carrying system that carried the water from the point of diversion in the creek to the mill tank, which served the purpose that a penstock usually serves, of equalizing and regulating the flow and the pressure. It was shown that at the mill tank, where the pressure was regulated, a suitable overflow device was maintained and the overflow water was carried away by a waste flume. No waste flume was installed or maintained to carry away the leaves or rubbish that came from

the rubbish spout, and many engineers testified that the waste flume could serve no useful purpose if maintained at that point. Witnesses were called, however, by the defendant in error, who testified that the penstock should be provided with waste flumes, but at least one of their expert witnesses, Mr. Crowther, testified that where a penstock served no purpose except the purpose of the penstock in question, that is to say, that where the pipe leading from it was larger than the pipe leading into it, and the penstock was kept one hundred per cent open, there would be no occasion for a waste flume.

The point is made, therefore, on the question to direct a verdict, that as long as there was no evidence to show that the pipe leading from the penstock had a carrying capacity less than the flume leading into it and no evidence to show that more water was conveyed to the penstock than the pipe did or could carry away and the evidence conclusively made it appear that such was not the case, but that the overflow, whatever there was, was due to another and different cause not alleged in the complaint nor referred to in the bill of particulars.

There was no evidence of the negligent acts complained of, especially in view of the fact that the evidence conclusively showed that the devices installed were the best that could be procured.

Another point raised by the motion to direct a verdict deals with the question of injury and re-

sulting damage. It is claimed that there was no evidence that any of the articles of property enumerated in the bill of particulars were injured or destroyed in the landslide and no evidence from which the jury could assess the damages. The evidence in the case claimed to have some bearing upon this question will be set up and referred to in detail when that point is discussed in the argument.

This last named question is not only the principal question raised by the motion to direct a verdict, but also the principal point relied upon for reversal herein.

Errors Assigned and Relied Upon for Reversal.

1. That the evidence is insufficient to justify the verdict.

2. That the court erred in denying defendant's motion for a directed verdict made at the close of the case, after the evidence on behalf of both parties had been adduced, submitted and closed, for the reasons stated in said motion, which is incorporated in the Bill of Exceptions and which will be more at length referred to hereafter.

3. That the court erred in instructing the jury as follows:

> "If your verdict should be for the plaintiff, it should be for such sum as you may find from the evidence he has been damaged, as the direct, natural and probable consequences of the slide. You cannot allow anything by way of punitive damages or smart money."

To which portion of the court's charge the defendant excepted on the ground that there was no evidence under which the jury could assess damages, there being no evidence of market value, nor evidence of the extent of the loss or damage, if any, sufficient for the jury to assess damages.

4. That the court erred in refusing to instruct the jury to bring in a verdict for the defendant.

5. That the court erred in overruling the motion for a new trial.

6. That the court erred in entering a judgment.

Argument.

A discussion of the second error assigned will present to the court the points sought to be presented. The other errors assigned merely raise the same questions in a different manner. At the close of the case a motion was made to direct a verdict.

The motion to direct a verdict was based upon several grounds, among others the grounds that there was no evidence of the negligent acts complained of in the complaint; that the evidence showed that the slide referred to in the complaint was not occasioned by any act or acts of the defendant in error; and that it was conclusively shown that if water coming from the diverting works of the plaintiff in error reached the slide area, this was not due to the negligence of the plaintiff in error, but to independent intervening causes.

Another ground presented by the motion to direct a verdict raised the point that there was no evidence of injury to the articles of property enumerated in the complaint and no evidence of the value of these articles upon which the jury could base a verdict.

In connection with the first point made, it will be observed, as stated in the Statement of Facts, that *the specific act of negligence charged was that the plaintiff in error permitted more water to flow into its penstock than the distribution pipe was able to carry away,* and that for that reason the water overflowed the penstock; that a series of spillways should have been maintained to keep so great a flow of water from coming to the penstock; and that a flume should have been constructed to take care of the overflow water.

The whole theory of plaintiff's case was based upon the fact that this penstock was the ordinary penstock that served to regulate the flow in the service pipe and control the pressure. That being the case, of course, water could back up in the service pipe and overflow the penstock itself, and, in cases of such a penstock, an overflow pipe or flume would be a proper device to employ to take care of the surplus water.

The evidence, however, did not tend to show that any such situation existed. There was no evidence whatsoever that the water backed up in the service pipe or that the service pipe was unable to carry away all the water deposited by the penstock or

flume. No witness testified to any such statement of facts and no evidence was adduced from which such condition of affairs could be surmised.

The uncontradicted evidence at the trial was that the service pipe, so-called, was approximately twice as large as the flume, that is to say, had a carrying capacity approximately twice as great as that of the flume; the penstock was not employed to regulate the flow in the service pipe, but was a mere device employed to get the water out of a square container, a flume, and into a round container, a pipe, and was simply a part of the carrying system. That the pipe emptied into the mill tank, which in fact was the penstock in the sense that it regulated the flow, and it was equipped with all the necessary overflow devices and waste flumes.

See evidence Bradley, record p. 575;
See also Dudley, record pp. 71 and 72.

There was, however, in the penstock a revolving screen, installed there for the purpose of screening the rubbish and debris from the water before it entered the pipe. This revolving screen was driven by an electric motor, and a sheet iron spout was installed to carry the debris screened from the water to the outside of the penstock. The device so installed was of such a character that no water could flow over it and out of the sheet iron spout unless the meshes became so clogged as to permit this, and this was not possible as long as the screen was kept in motion, as it was so constructed that it would

automatically clean itelf and permit the water to flow through the meshes.

Not only are the engineers of plaintiff in error agreed upon this point, but Mr. Dudley, an engineer called by the defendant in error, testified as follows:

> "Q. And if you had a screening device that was so built—8 feet long—and driven by the safest power that can be had, and revolving, there would be no reason to anticipate that that thing would ever get clogged, would there?
>
> A. Unless something happened to the motive power.
>
> Q. Unless something happened to the motive power it would not stop?
>
> A. No, sir.
>
> Q. And as long as it kept running there would be no possible chance for the water to get out of it?
>
> A. No probable chance.
>
> Q. The only thing that would come out of it would be the leaves and the moss?
>
> A. Yes, sir; under ordinary working conditions."
>
> See evidence Dudley, record p. 82.

Now, what actually did happen was this: Shortly before the landslide referred to in the complaint there was another and different landslide in a gulch at a point above plaintiff in error's flume line, the effect of which was to permit the leaves and rubbish from the gulch in which the slide occurred to find their way into plaintiff in error's flume, so that the water flowing therein became heavily charged with leaves and moss.

This fact is set up in the answer and not denied in the reply and was upon the trial established by

uncontradicted proof. (See evidence Kelly, record p. 807.)

There was no evidence tending to show that the screen had stopped until about the time the solid mass was precipitated down the mountainside. A number of the witnesses testified that the screen was in motion and that no water was coming from it during the forenoon.

See evidence Smith, record p. 812;
See evidence Johnson, record p. 184;
See evidence Newman, record p. 831;
See evidence Dowling, record p. 793;
See evidence Kelly, record p. 806;
See evidence Tielins, record p. 781;
See evidence Richards, record p. 641.

Just prior to the time that the mass came down the hillside, two men, Johnson and Newman, came through the tunnel immediately above the penstock, and as they passed through there, observed that the lights in the tunnel were out, indicating that there was no electric current upon the circuit by which these lights were fed. The lights in the tunnel were on the same circuit that supplied power to the trommel screen motor, and when these men reached the trommel screen, they found that it was standing still, and that a stream of water was flowing over it and out of the discharge spout designed to carry away leaves.

It is claimed by the plaintiff in error that the power went off from this circuit a few moments be-

fore this, because of the fact that the mass, which shortly afterwards slid down, had already moved sufficiently to set the tower of the Gastineau Company in motion and cause the wires strung thereon to insulate and come in contact with the wires of the plaintiff in error three times in reasonable quick succession, thereby causing three short circuits on plaintiff in error's line, which had the effect of throwing out feeder No. 15, which was the circuit from which the trommel screen and the lights in the tunnel were supplied by electric current.

Flashes were seen on the hillside as the wires were brought in contact (see evidence Cook, record p. 751), and the result that short circuits were registered on the voltage chart kept in the power house of plaintiff in error, Exhibit 11, and were observed by the electrician in charge, who also testified that the effect of these three short circuits was to throw out circuit No. 15, a matter of five or ten minutes before the landslide happened. (See evidence Bausman, record p. 910.)

Of course, if the screen stopped at the time the wires were thus brought in contact, and the system short-circuited, it would soon overflow because of the fact that the water was heavily charged with rubbish brought into the flume by the slide above the flume line previously, and it is claimed by the plaintiff in error that this is what happened. There is no evidence in the record that the screen stopped before this time. Many witnesses above referred to testified that it was running at various times in the

forenoon, and Mr. Richards, the company's superintendent, testified that he was there at about ten minutes before eleven, less than half an hour before the slide, and the screen was then in motion and functioning properly.

The plaintiff in error's position, therefore, that the screen came to a stop because of a short circuit occasioned by a contact of its wires with those of the Gastineau Company, which in turn were set in motion by a movement of the solid mass, is established by the uncontradicted testimony in the case, and as already stated, there was no evidence whatsoever to show that more water came into the penstock than the service pipe carried away, or that any water overflowed the penstock at all from any cause whatsoever. It being established by the uncontradicted proof that whatever water came from the penstock at any time flowed out on this rubbish spout because the meshes of the screen were so clogged as to permit a portion of the water discharged from the flume to flow over the screen instead of through it—a condition that could not happen unless a screen was stopped, and as already stated, the screen did not stop until the mass had already started to move and brought about the conditions which caused the screen to stop.

Now, the act of negligence charged is not that water overflowed the screen for any reason, but that water overflowed the penstock, because more water was brought to it than the service pipe could carry

away, and it was alleged that spillways should have been maintained to relieve the pressure upon the flume to prevent this situation from arising, and that a waste flume should have been installed to carry away the water that would thus be caused to overflow.

No evidence was introduced to show that there was an absence of necessary spillways—of course, there could not be such evidence in the face of the fact that there was no evidence that there was a surplus of water which the pipe could not or did not carry away.

The evidence did show that there was no waste flume designed to carry away overflow water coming from the penstock, but in the absence of evidence tending to show any of the negligent acts charged as responsible for the overflow, it would be entirely immaterial whether there was a waste flume there or not. This would be true even if there were no other evidence upon the subject. But aside from this fact that plaintiff in error's engineers all agreed that a waste flume could serve no useful purpose if installed at this point (see evidence Bradley, record p. 572; evidence Metzger, record p. 687; evidence Richards, record p. 649), the reason for this being that no water would be expected to come from this spout designed to discharge the leaves, and that if water did come from it, it would drain down the gulch where it could do no harm to any one.

Mr. Dudley, defendant in error's engineer, agrees with the engineers of the plaintiff in error that the

natural flow of water coming from this spout, if any water should come from it, would be down the gulch where it could do no harm. After testifying that he had traced the flow from the spout of the penstock down the hog back by observing leaves and small sticks that had been deposited by the water as it flowed, he testified that the water followed a trail over the top of the ridge in the direction of the slide area—that it entered the trail 50 or more feet below the spout and remained within the trail until the slide area was reached. Mr Dudley's testimony is as follows:

"Q. Now, that trail, Mr. Dudley, runs right over the center of the hog-back, doesn't it—that is, approximately?

A. Approximately, yes.

Q. It slopes from both sides—the hog-back slopes down in both directions, does it not—in a northerly and southerly direction from the trail?

A. Yes, sir.

Q. There is a gulch on the northerly side of the trail and a gulch on the southerly side—that is true, isn't it?

A. Yes, sir.

Q. Now, the natural drainage of water coming from that spout, if it were not for that trail holding it, would be in the direction of either one or the other of those gulches, would it not?

A. Unless something interfered with it, yes.

Q. If there were nothing on the ground to keep that water right on that hog-back it would run in one direction or the other, wouldn't it?

A. Yes, sir.

Q. It would immediately as it left the spout find its way to the lowest level of one gulch or the other?

A. Yes, I would say that is true.

Q. And the only reason it flowed over the hog-back was because there was a trail there for it to run into—that is right, isn't it?

A. It would never have gotten into the trail unless something threw the water into the trail —having found the trail, it followed the trail.

Q. There might have been a sand bank, or something like that.

A. Yes.

Q. But had there been no sand bank it would never have reached the trail, would it,— the natural drainage would have taken it one way or the other?

A. Probably so."

See evidence Dudley, record p. 52 and again on p. 67.

After testifying that in his opinion it would have been a proper precaution to have built a waste flume below the spout, Mr. Dudley testified as follows:

"Q. Now, Mr. Dudley, referring to the matter that Mr. Roden just referred to, where would you lead that flume to?

A. Right into Portal Gulch.

Q. Into Portal Gulch?

A. Yes; that is the natural place for it.

Q. Then the water would run down Portal Gulch, wouldn't it?

A. Yes, sir.

Q. Would that be a safe place?

A. For all I can see, yes.

Q. That would be a safe place?

A. Yes; a natural drainage channel; yes, sir.

Q. If you were to build that flume, you would build it from the spout to Portal Gulch?

A. Yes, sir; or near there.

Q. Now, if there was no sand on the ground or anything else, you have testified that the water would naturally run into that gulch, haven't you—if there were no obstructions?

A. If there were no obstructions."

In view of the testimony of Mr. Dudley upon this question, it is, of course, not necessary to burden the court with the testimony of the various engineers called by plaintiff in error, who testified that the natural drainage from the bottom of the spout was down Portal Gulch, and the testimony of plaintiff in error's expert witnesses upon the other question that no flume such as has been referred to could serve a useful purpose in connection with the maintenance of this particular kind of a penstock was further corroborated by Mr. Crowther, another engineer called by defendant in error who testified upon cross-examination, as follows:

"Q. Yes, equalizing the flow, but let us go a little further. Now, assuming that this penstock is as I have indicated, that is to say, that the service pipe flowing from the penstock has a greater capacity than the flume, and the service pipe is kept open so that the flow is continuous, there would be no occasion for an overflow arrangement at the penstock, would there?

A. No; providing that your use of the term open means one hundred per cent operation in your service pipe.

Q. Yes; exactly—that is what I mean. I am assuming that the carrying capacity of the service pipe is larger than the carrying capacity of

the flume, and that the service pipe is not obstructed—that it is entirely open, there would not, under those circumstances, be any occasion for an overflow at the penstock—would there?

A. No, there would not."

See evidence Crowther, record pp. 127-128.

This then leaves the case in this situation:

There was no evidence that more water was conveyed to the penstock than the service pipe could or did carry away. There was no evidence that the water backed up in the service pipe and overflowed the penstock. On the other hand, the evidence was conclusive that this did not occur. There was evidence that there was no overflow flume to carry away the water that did overflow the trommel stream, but the evidence also conclusively shows that the reason the water flowed in the direction of the slide area, whatever water did flow in that direction, was not due to the absence of a flume, but was due to other causes. Under natural conditions, if there had been no other causes, the water would have flowed down Portal Gulch, its natural line of drainage, along the same course that it would have taken had a flume been constructed under Mr. Dudley's direction. The reason it did not follow this course on this occasion was due to the fact that its flow was deflected by a sand bank or some other obstacle as was shown by the testimony of Mr. Dudley, whose testimony upon this point is in entire accord with a number of plaintiff in error's engineers, with the details of whose testimony it will

not, of course, be necessary to burden the court in view of Mr. Dudley's position as a witness on behalf of defendant in error. Nor would it flow down the hog-back in the direction of this slide area, had it not been for a trail which ran along the hog-back in which the water flowed.

Now, it is not charged that plaintiff in error was negligent in permitting a sand bank, snow bank or other object to deflect the course of the stream coming from the penstock spout so that it did not follow its natural drainage into Portal Gulch. Nor is there any evidence on that point. Nor is it charged that the plaintiff in error was responsible for the existence of the trail which carried the water along the course of the hog-back. Nor is there any proof upon that subject.

The situation then is that the water which came from the penstock did not come from it because of the negligent acts charged, and did not flow in the direction of the slide area because of any negligent act charged, even though it should be conceded that water actually flowed from the penstock prior to the slide—a point upon which there is no evidence in the record as we have indicated in our statement of facts—except the bare statement of some witnesses who saw a stream of water coming from the flume level, which, when described by them was clearly nothing more than a stream of surface water, which was carried over the top of the flume, a short distance to the south of the penstock and allowed to drop back down into the gulch and flow down its natural channel.

Although some of these witnesses did testify that the water they saw came from the penstock and it is this bare statement of these witnesses to the effect that the water they saw came from the penstock that must be relied upon to create a conflict of testimony upon this point, and this as has already been stated, in spite of the fact that they described a stream that could not come from the penstock but was nothing more or less than the surface water above referred to.

To this must be added the further statement that the trommel screen was installed in April, 1918. (See evidence Higgins, record, p. 862.) Prior to that time a flat screen had been used at that point, but it was found that the flat screen occasionally clogged up and overflowed, and for that reason the revolving screen which cleaned itself and was the most efficient device known for that purpose, was installed. (See evidence Bradley, record, p. 571.)

At the time this installation was made, the plaintiff in error did not have in stock a motor of the type and size required. An order for the necessary motor was at once sent in. This was during the war and there was some delay in getting delivery of the required motor. In the meantime, a 3 H. P. motor which the company had on hand was installed. This was a 3-phase motor, operating on a single phase circuit. (See evidence Higgins, record, pp. 863-870 and 871.)

During the time this improvised motor was in use, a period of eight or nine months, some difficulty was

experienced in connection with its operation. The screen stopped on several occasions, and on some occasions it overflowed. (See evidence Higgins, record, p. 871.)

About a year before this slide, the required motor arrived and was installed. Mr. Higgins, after testifying that the 2 H. P. motor arrived, testified as follows:

> "Q. What did you do in the way of installing that?
> A. We installed it as soon as we got it.
> Q. How long before the slide was that?
> A. Well, we installed that motor along in January of 1919."

Mr. Higgins then tells of two other occasions when the motor had been stopped because of repair work or other activities by the employees on the system, but testifies that since the time of the installation of the new motor, the screen had not stopped a single time because of any defect or failure of the new motor to operate. Nor had it stood still for any cause whatsoever since July or August of 1919. His testimony upon that point is as follows:

> "Q. When was the last time that you had any trouble with it?
> A. The last time was in July or August, 1919.
> Q. Since you put in the new motor, the 2 H. P., 3-phase circuit motor, did you have any trouble with the motor, that was the fault of the motor itself?
> A. No, sir.

Q. Did you have any trouble with anything except outside disturbance that you have explained?

A. No, sir."

(See evidence Higgins, record, page 875.)

Now, the evidence showed that on such occasions as the course taken by the water was observed when this overflow occurred, it drained in the direction of Portal Gulch, along the natural line of drainage, and there is no evidence that the water coming from the trommel screen on these previous occasions caused any landslide or did any other damage whatsoever. The fact that water coming from the screen on these previous occasions did no damage, coupled with the fact that the screen had been in successful operation without the slightest difficulty or disturbance for many months prior to the slide, in fact, ever since the improvised motor had been replaced by the new motor, would seem to establish, even if standing alone, that there was no negligence in connection with the installation or maintenance of the devices employed.

The outstanding feature of the case, however, is that landslides had occurred at intervals on the hillside in this immediate vicinity ever since the town of Juneau was in existence (see evidence Saum, record p. 822 et seq.—evidence Goldstein, record p. 215), that there were six other landslides in the immediate vicinity of the place where the slide, which is the subject of inquiry, occurred during the wet spell that existed at that time. Four

of these landslides occurred on the same forenoon—one was at Woods Gulch, to which reference has already been made (see evidence Kelly, record p. 807); two others were above the flume line of the plaintiff in error at points further up (see evidence Dowling, record p. 794); another slide of great magnitude occurred right opposite the Ebner Mine at about the same moment that the slide now being inquired into occurred (see evidence Oswell, record p. 567); another slide occurred at Salmon Creek, a short distance away above the flume of the Gastineau Company, either that day or the following day (see evidence Jackson, record p. 676). Still another slide occurred within a few yards of where the slide referred to in the complaint took place within a few days after it happened, but during the same wet spell.

Now, while it is true that any man whose mind had been disciplined by science would, without hesitation, relate all these landslides to the same cause, it is, of course, equally true that the jury had the right to find that all the other slides were the result of natural causes, that is to say, the rain melting snow, and that this slide alone was due to the negligent acts of the plaintiff in error. But it would seem that before a verdict based upon such conclusions of fact could be sustained, it should at least be supported by some clear and convincing evidence proving or tending to prove the specific acts of negligence charged in the complaint.

INJURY AND DAMAGE.

The second point we desire to urge why the motion to direct a verdict should have been allowed is that there was no evidence either of injury or damage upon which the jury could base a verdict. This point was made in the motion to direct a verdict, and, of course, also carries under each of the various assignments of error above set forth.

The allegations of the complaint relating to the damage sustained are as follows:

That the said store building on lot one was damaged in the sum of $1500.00.

That plaintiff's stock of merchandise in his said store and warehouse was destroyed in the amount of $2500.00.

That the said warehouse was of the value of $1500.00 and was utterly destroyed to the plaintiff's damage in the sum of $1500.00.

That the said apartment house of plaintiff was of the value of $8500.00, and was utterly destroyed in the plaintiff's damage in the sum of $8500.00.

That the furniture and equipment of said apartment house belonging to plaintiff was of the value of $2000.00 and was destroyed to plaintiff's damage in the sum of $2000.00.

That the aforesaid three rows of cabins, containing eleven apartments were of the value of $3000.00 and wholly destroyed to plaintiff's damage in the sum of $3000.00.

That the aforementioned store building on lot 2, was damaged in the sum of $1000.00, and that the aforementioned premises on which said destroyed buildings were situated at the time and prior to said slide, were damaged in the sum of $1500.00.

After the complaint was filed a Bill of Particulars was filed more specifically enumerating the articles of personal property referred to as destroyed or damaged in the complaint, which said Bill of Particulars was as follows:

"Bill of Particulars.

Comes now plaintiff and in compliance with the order of the court submits the following as his bill of the particulars, items of personal property referred to in his complaint and for which he claims damages, to wit:

General merchandise in store consisting of groceries, boots, shoes and clothing	$1,500.00
Groceries in warehouse consisting of rice, bacon, hams, flour, beans, etc.	1,000.00
Furniture and fixtures in apartment house:	
4 stoves at $25.00	100.00
4 kitchen ranges at $100.00	400.00
10 rugs at $25.00	250.00
4 beds with springs and mattresses at $40.00	160.00
4 tables at $25.00	100.00
4 dressers at $30.00	120.00
20 chairs at $5.00	100.00
8 sets light fixtures at $10.00	80.00
Kitchen utensils consisting of pots, pans and dishes	230.00
4 sets linoleum at $25.00	100.00
4 bathtubs at $35.00	140.00
4 sinks at $15.00	60.00

4 wash-bowls at $15.00	60.00
4 toilets at $25.00	100.00
Total	$4,500.00

A more itemized or detailed statement cannot be furnished by plaintiff."

There was no evidence adduced at the trial tending to prove that any of the property of the plaintiff was injured by the landslide complained of, or that the plaintiff suffered any damage. The only evidence that was presented with a view of establishing these facts was the testimony of the plaintiff Goldstein. After testifying that he was the owner of several lots situate on the slope of Mount Roberts and described in the complaint, Mr. Goldstein's testimony was as follows:

"Q. How had these lots been improved?

A. Where the store building is, there is a two-story building 36 by 50—2 stories high; and then there was a big shed in the back of that; and directly back of that was an apartment house 48 feet square, two stories.

Q. Have you made a list so that you would be able to tell the court and jury the value of these different pieces of property?

A. I have, as near as I can judge the value of them.

Q. Have you got that statement with you?

A. I have.

Q. You may use that in describing the different values.

A. You mean the value of the property or the value of the damages? I estimated the value of the damage done to the property.

Q. Give us the estimated damage.

A. The damage I consider done to the store building was $1500.00.

Q. How did you arrive at that figure?

A. I estimated that value on it.

Q. What did you base that estimate on?

A. What it cost to do work at the present time, or did at the time of the slide.

Q. Have you made inquiries as to what it would cost?

A. I have made inquiries of different carpenters.

Q. Go ahead.

A. The damage to the stock in the store was $2500.00.

Q. To the stock?

A. Yes, by water and mud—that was damage to the stock.

Q. How did you arrive at that figure?

A. Why, the amount of goods that was damaged and was lost, at the price goods was worth at that time.

Q. Go ahead.

A. Warehouse damages $1500.00. I had to rebuild that.

Q. How much did it cost to rebuild it?

A. It cost me,—Well, it isn't finished yet. I have spent about $700 on it so far, but it is just about half completed—haven't been able to finish it up.

Q. Go ahead.

A. The apartment house on the hill at $8500.00.

Q. How did you decide on that?

A. That is what it would cost me to rebuild it. I have had estimates from carpenters, what it would cost to rebuild that property; and there was fixtures in the apartment house, $2000.00—there were four 5 room apartments. Three rows of cabins, $3000; and damage to building on lot 2, block M—that is the building which the Russell gun store is in, which I own—figure it would cost $1000 to rebuild that; and then damage to the lots on the hill $1500.00.

Q. What is that real estate worth now?

A. It is worth,—well, I don't know—they are taxing me a hundred dollars for the lots at the present time—that is what the last assessment was.

Q. How much was the last assessment before the slide?

A. $1500; and they assessed me a hundred dollars for the lots where the apartment house was.

Q. That is the city assessor?

A. The city assessor, yes, sir.

Q. What else did you lose at that time, Mr. Goldstein?

A. Well, I don't know.

Q. Have you given a complete list now of the items?

A. Outside of the furniture and fixtures in the apartment house—I had to itemize those.

Q. What was the furniture and fixtures worth?

A. The way I have it itemized, general merchandise in the store, consisting of boots, groceries, shoes and clothing, $1500.00; groceries in the warehouse, consisting of rice, bacon, hams, flour, beans, etc., $1000.00; furniture and fixtures in apartment house, 4 stoves at $25.00, $100.00; 4 kitchen ranges at $100.00, $400.00; 10 rugs at $25.00, $250.00; 4 beds with springs and mattress at $40.00, $160.00; 4 tables at $25.00, $100.00; 4 dressers at $30.00, $120.00; 20 chairs at $5.00, $100.00; 8 sets light fixtures at $10.00, $80.00; kitchen utensils consisting of pots, pans and dishes, $230.00; 4 sets linoleum at $25.00, $100.00; 4 bathtubs at $35.00, $140.00; 4 sinks at $15.00, $60.00; 4 wash-bowls at $15.00, $60.00; 4 toilets at $25.00, $100.00.

Q. Makes a total of how much?

A. $21,500.00.

Q. Is that a fair estimate and valuation of the property which you lost at that time?

A. I consider it fair, yes. I don't think it could be duplicated for any less than that.

Q. You say this property had been occupied since when?

A. The store building had been occupied since 1886—that is, the premises; the other had been occupied since 1913, I think that was the time it was built.

Q. Now, this place where you were living, I want to ask you if any of the adjoining property around the neighborhood had been occupied and improved any prior to the slide?

A. It sure had—the entire Front Street had been occupied for years back, as far as I can remember.

Q. How far back can you remember?

A. About 30 years.

Q. What damaged this property that you have enumerated here?

A. The landslide back of the buildings, coming from the top of the hill there.

Q. When did this happen?

A. January 2, 1920."

(See evidence Goldstein—record p. 206 et seq.)

And on cross examination, Mr. Goldstein testified as follows:

"Q. Mr. Goldstein, I think you stated before the store building which is there now,—that isn't the building that were there in 1886?

A. No, sir.

Q. It is a new building?

A. It is on the same lot.

Q. You had a store building there back in the early days and occupied it?

A. Yes, sir.

Q. And the property behind that, you put your improvements on in 1913, didn't you?

A. Either 1912 or 1913, I wouldn't say, for certain.

Q. About that time?
A. Yes.
Q. And the valuation that the city placed upon that was $1300.00, you say?
A. No, I think it was $1500.00, on that lot.
Q. That is when the buildings were on it?
A. No, sir, the lot.
Q. On the lot?
A. On the lot.
Q. The buildings were on the ground the year before the slide, weren't they?
A. Yes.
Q. What was the valuation of the lot at that time?
A. The assessed valuation?
Q. Yes.
A. I wouldn't say for certain—I don't remember what that was.
Q. Approximately?
A. I don't remember what it was,—I would have to look up the records to see.
Q. You don't mean to say the lot was assessed at $1500.00?
A. It was valued at $1500.00.
Q. It was not assessed at that?
A. No.
Q. The comparison you have there now is the assessment that was made when the buildings were upon the lot?
A. Yes, sir.
Q. And it was assessed at $100.00 after the slide?
A. The bare lot was assessed at $100.00.
Q. And when the buildings were there it was assessed at $1500.00 for the lot?
A. For the lot?
Q. Yes.
A. No, sir, it was not.
Q. Was the value of the house assessed separately?
A. No, sir.

Q. Well, how did they separate the value of the house and the value of the lot?

A. He asked me what was the value of the lot and I told him, and then they put the value of the house and lot together.

Q. How much was that, do you remember?

A. I think it was $4500 or $5000 that was assessed at—I wouldn't say for certain.

Q. Did that include the store building?

A. No, sir.

Q. That was the property behind the store?

A. That was the apartment house.

Q. The store building was a separate proposition?

A. Yes, sir.

Q. The apartment house and the cabins were all on the same lot, weren't they?

A. No, they were not on that same lot.

Q. Weren't they on that same assessment?

A. No, sir.

Q. How much were the cabins assessed at?

A. I wouldn't say for certain—I think it was a thousand dollars but I wouldn't say for certain until I looked it up.

Q. How much was the store assessed at?

A. The building and the lot I think is $5000.00.

Q. The items of damaged stock you had in there, do you remember what particular articles of merchandise were damaged? In the store,—not in the warehouse, now, but in the store.

A. I wouldn't say the particular items, no.

Q. Did you make a list of those things that were damaged, at that time?

A. I did not.

Q. And your estimate as to what the damage was is a mere estimate?

A. A mere estimate.

Q. You wouldn't be able to tell us now what that estimate consisted of—that is to say, what the articles were that were damaged?

A. No.

Q. You don't know whether it was tons or bulk?

A. I know it was all included in that. I don't know just the particular stuff I lost there —I don't know the articles—I know some of them, but I don't know just how much.

Q. The estimate of the damage in the store was in your judgment $1500.00?

A. I don't know whether it was $1500—I read it off the list here.

Q. $1500.00 is my recollection.

A. $2500.00.

A. That $2500.00, is that damage to the stock in the store?

A. What stock in the store?

Q. You don't know what the damage was that was done?

A. I am estimating how much damage was done. I wouldn't come here on oath and testify how much damage was done because there is no way of figuring it up, because that stuff was going right out of the front door on to the beach, and I didn't stand there in the door and check it up as it went out of the store.

Q. You don't know what it was that went out at that time?

A. I do not, no, sir.

Q. Your estimate is based upon your best judgment as to what you think your damage was?

A. Yes, sir.

Q. You wouldn't testify that that was it or wasn't it—is that right?

A. I would not.

Q. And that is true of the other things you have spoken of?

A. It is.

Q. The stuff in the warehouse, you don't know just what that was?

A. I couldn't get into my warehouse for two weeks because the buildings were laying right on top of it.

Q. There was no way of getting at it, and you only estimated it?

A. Only estimated it.

Q. There was no way of telling except by giving your best judgment upon it?

A. Yes.

Q. Your furniture in the apartment house, Mr. Goldstein, did that cost you the amount of money that you say it did, or that you estimate it was worth at the time of the slide?

A. I esimate it was worth that at the time of the slide.

Q. It cost you less than that, didn't it?

A. I don't know whether it did or not,—I don't know what I did pay for it.

Q. The buildings, how much did they cost you?

A. I don't remember what that was either, but I know the apartment house cost me about $8000.00.

Q. And as to the rest of the buildings, you don't know?

A. I don't know.

Q. When was the apartment house built?

A. 1913, I think it was,—1913 or '14.

Q. And you have rented it ever since to tenants?

A. Yes, sir.

Q. Occupied pretty nearly all the time?

A. Not all the time,—they were moving in and out of them all the time.

Q. Had been used as a building for rent?

A. Yes, sir.

Q. That included the plumbing and the plumbing fixtures, and everything like that?

A. Yes, sir.

Q. That took the plumbing fixtures in?

A. Yes, that is the plumbing fixtures,——

Q. I don't mean furniture, I mean plumbing fixtures, bath tubs and stuff like that?

A. Yes."

(See evidence Goldstein, record p. 210, et seq.)

No other evidence in any wise relating either to the question of injury or damage was offered or received.

The jury found a verdict for the plaintiff in the sum of $18,275.00.

A motion for new trial was made, and the court having decided that there was no evidence whatsoever of any damage to the real estate and no evidence whatsoever of any damage to the three rows of cabins, the former item for $1500.00 and the latter for $3,000 (see court's opinion, record p. 1017), it was ordered that the motion for new trial be denied only upon condition that the plaintiff remit $4500.00 of the amount of the verdict, which was accordingly done and judgment entered against the defendant for the balance.

1. The first item for which damage is claimed is to the store building on Lot 1, which it is alleged was damaged in the sum of $1500.00. The only evidence touching the extent of the damage to this store building is as follows:

> "Q. Have you made a list so that you would be able to tell the court and jury the value of those pieces of property?
>
> A. I have, as near as I can judge the value of them.
>
> Q. Have you got that statement with you?
>
> A. I have.
>
> Q. You may use that in describing the different values.
>
> A. You mean the value of the property or the value of the damages? I estimated the value of the damages done to the property.

Q. Give us the estimated damage.
A. The damage I consider done to the store building was $1500.00.
Q. How did you arrive at that figure?
A. I estimated that value on it.
Q. What did you base that estimate on?
A. What it cost to do work at the present time, or did at the time of the slide.
Q. Have you made inquiries as to what it would cost?
A. I have made inquiries of different carpenters."

(See evidence Goldstein, record p. 172.)

There was no evidence as to how, if at all, the store building was injured by the slide, what was the matter with the building, what had happened to it, what had to be done to repair it, what its market value was before the slide, what its market value was after the slide, in what respect the market value after the slide differed from its market value before the slide—if at all—whether the work which Mr. Goldstein estimated had to be done was on the roof or at the foundation; Mr. Goldstein does not say that he knew anything about the cost of the character of the work that was to be done of his own knowledge. He said he had consulted carpenters, but their statements would hardly be evidence, even if they had been included in the record; they might have been brought into court and called upon to testify under oath, but this was not done. There was no way in the world that the defendant could call witnesses to meet the testimony offered by Mr. Goldstein. He estimated the damages to a building, the injuries to which he did

not describe, as being $1500.00. No witness could testify that his estimate was not correct, for the facts upon which it was based were not revealed. Had he testified as to how the store had been injured, witnesses might have been called to meet his testimony, but even then it would not be a question of making an estimate, it would have to be shown as to what parts of the building were damaged, what would have to be done to repair it, what this would cost, and these things would have to be done by parties familiar with the matters to which they testified. Mere guesses and estimates would not suffice.

The plaintiff in error was entitled to have a full disclosure of the situation made so that it on its part could produce evidence to show what the monetary damage consisted of, and it also had a right to have these matters submitted to the jury so that the jury might know the exact situation, know where and how and in what particulars the building was injured, if at all, so that they would be in a position to fix the damages, for it is the province of the jury, after all the facts have been placed before them, to determine what the damage had been.

All these facts were withheld and there was therefore nothing for the jury to pass upon.

Unsatisfactory, however, as may have been the evidence upon this particular item, it came nearer to being evidence than anything that was offered in relation to any of the other items.

2. The second item enumerated in the complaint is as follows: That plaintiff's stock of merchandise in said store and warehouse was damaged in the amount of $2500.00. The testimony of Mr. Goldstein in relation to this matter was as follows:

"Q. Go ahead.
A. The damage to the stock in the store was $2500.00.
Q. To the stock?
A. Yes, by water and mud—that was damage to the stock.
Q. How did you arrive at that figure?
A. Why, the amount of goods that was damaged and was lost, at the price goods was worth at that time."

(See evidence Goldstein, record p. 207.)

On cross-examination the witness, referring to the item now under consideration, testified as follows:

"Q. The items of damaged stock you had in there, do you remember what particular articles of merchandise were damaged? In the store,—not in the warehouse, now, but in the store.
A. I wouldn't say the particular items, no.
Q. Did you make a list of those things that were damaged, at that time?
A. I did not.
Q. And your estimate as to what the damage was is a mere estimate?
A. A mere estimate.
Q. You wouldn't be able to tell us now what that estimate consisted of, that is to say, what the articles were that were damaged?
A. No.
Q. You don't know whether it was tins or bulk?

A. I know it was all included in that. I don't know just the particular stuff I lost there —I don't know the articles—I know some of them, but I don't know just how much.

Q. The estimate of the damage in the store was in your judgment $1500.00?

A. I don't know whether it was $1500—I read it off the list here.

Q. $1500.00 is my recollection.

A. $2500.00.

Q. That $2500.00, is that damage to the stock in the store?

A. What stock in the store?

Q. You don't know what the damage was that was done?

A. I am estimating how much damage was done. I wouldn't come here on oath and testify how much damage was done, because there is no way of figuring it up, because that stuff was going right out of the front door on to the beach, and I didn't stand there in the door and check it up as it went out of the store.

Q. You don't know what it was that went out at that time?

A. I do not; no, sir.

Q. Your estimate is based upon your best judgment as to what you think your damage was?

A. Yes.

Q. You wouldn't testify that that was it or wasn't it—is that right?

A. I would not.

Q. And that is true of the other things you have spoken of?

A. It is.

Q. The stuff in the warehouse, you don't know just what that was?

A. I couldn't get into my warehouse for two weeks because the buildings were laying right on top of it.

Q. There was no way of getting at it, and you only estimated it?

A. Only estimated it.

Q. There was no way of telling except by giving your best judgment upon it?

A. Yes."

(See evidence Goldstein, record pp. 213-214.)

The foregoing is all the evidence relating to this item in any manner. There was no evidence tending to show what the slide did to these articles of merchandise, except that Mr. Goldstein said some were washed through the door by the mud and water. No one testified as to what the articles were that were damaged, whether they were good quality or of inferior quality; whether they were new and marketable or old and shelf-worn; whether they consisted of one thing or some other things. Not knowing what the articles were, of course no one could testify as to what their market value was, and no evidence was given upon this subject. Mr. Goldstein very frankly says that he merely gave an estimate of the damage done to his stock and would not swear to the correctness of it. Clearly, before the plaintiff had a right to ask the defendant to pay him damages, he should have been well enough satisfied in his own mind that he was damaged in a fixed amount to have been willing to make oath to that fact.

All there was here before the jury was the case of Mr. Goldstein that he was damaged in the sum of either $1500.00 or $2500.00, he didn't know which without consulting the list, and he very carefully informs us that this is a mere estimate, to which he is unwilling to make oath.

How could the plaintiff in error meet that sort of testimony? Other witnesses might have been called, to be sure, who could have testified as Mr. Goldstein did, but they did not know what the articles of property lost or injured were, and not knowing, they would venture a guess that they were less than what Mr. Goldstein guesses they were worth.

The measure of recovery in a case of this character could be nothing other than the market value plus the interest.

Under this evidence the jury could not determine in the first place what articles, if any, were injured, nor was there the slightest evidence of what the market value of these articles was.

3. The third item enumerated was "Damage to warehouse, $1500.00". The only evidence as to this item was as follows:

Mr. Goldstein testified:

> "Q. Go ahead.
> A. Warehouse damages, $1500.00; I had to rebuild that.
> Q. How much did it cost to rebuild it?
> A. It cost me—well, it isn't finished yet. I have spent about $700.00 on it so far, but it is just about half completed. Haven't been able to finish it up."

4. The fourth item enumerated was "Damage to apartment house, $8500.00". As to this item Mr. Goldstein testified as follows:

"Q. Go ahead.

A. The apartment house on the hill at $8500.00.

Q. How did you decide on that?

A. That is what it would cost me to rebuild it. I had estimates from carpenters what it would cost to rebuild that property.

Cross-Examination.

Q. You had a store building back in the early days and occupied it?

A. Yes, sir.

Q. And the property behind that you put your improvements on in 1913, didn't you?

A. Either in 1912 or 1913, I wouldn't say for certain.

Q. About that time.

A. Yes.

Q. The buildings, how much did they cost you?

A. I don't remember what that was, either, but I know the apartment house cost me about $8000.00.

Q. The rest of the buildings you don't know?

A. I don't know.

Q. When was the apartment house built?

A. 1913—I think it was 1913 or 1914.

Q. And you have rented it ever since to tenants?

A. Yes, sir.

Q. Occupied pretty nearly all of the time?

A. Not all the time; they were moving in and out all of the time.

Q. Had been used as a building for rent?

A. Yes, sir.

Q. That included the plumbing—the plumbing fixtures and everything like that?

A. Yes, sir.

Q. That took the plumbing fixtures in?

A. Yes, that is the plumbing fixtures.

Q. I don't mean furniture, I mean plumbing fixtures, bath tubs and the stuff like that.
A. Yes."

In regard to item number four, W. B. Hargraves, having testified as to the time he made a survey, and that he was familiar with the conditions on the ground as they existed on January 7, 1920, and being interrogated in regard to what was shown on exhibit marked Defendant's Exhibit No. Two, testified as follows:

"Q. Just enough to move it off its foundation. There is a line marked there 'Gastineau Avenue'—what does that indicate?
A. That indicates a portion of Gastineau Avenue below the slide or Gold Street.
Q. The line marked Franklin Street indicates Front Street, doesn't it?
A. Yes.
Q. The buildings between Gastineau Avenue and Front Street that you have indicated there, what does that indicate?
A. Indicates buildings as they were before the slide as near as I can get the information, and the real black ones—they were there at the time I surveyed the ground with the exception of one; one has since been torn down.
Q. The two buildings in black lines, they were there at the time you made your survey?
A. Yes.
Q. When was that?
A. May 21st.
Q. What is this little building about the black line?
A. That is still there.
Q. Do you know what that was?
A. A little shack.
Q. What is the other one, down below that?
A. It appears to be a series of shacks or apartments, a long row of buildings.

Q. That is one of the Goldstein apartment houses.

A. So I understand.

Q. These buildings in the dotted lines—what do they indicate?

A. Indicate buildings that were there before the slide.

Q. Those were buildings that were there before the slide?

A. Yes.

Q. How did the slide affect this little building?

A. As far as you can tell it didn't affect it at all.

Q. And it did affect the other one below the apartment house?

A. As near as I can tell it moved it three or four feet. There is a big stump that holds the corner of it—that stump is still there that protected the building.

Q. Was that building damaged very much?

A. It didn't appear to be.

Q. The other little building is still there?

A. Yes, the other little building is still there.

Q. And the others you have marked in dots they were demolished by the slide?

A. They were damaged considerable.

Q. The other in the black square down on Franklin Street—what does that represent?

A. That represents the lower Goldstein store building.

Q. That is the present store that is still on the ground?

A. Yes, sir."

5. Concerning item number five, the only evidence is that of Mr. Goldstein, as follows:

"Q. Go ahead.

A. The apartment house on the hill, $8500.00.

Q. How did you decide on that?

A. * * * And there was fixtures in the apartment house, $2000.00.

Q. Have you given a complete list now of the items?

A. Outside of the furniture and fixtures in the apartment house; I had to itemize those.

Q. What was the furniture and fixtures worth?

* * * * * * * *

A. Furniture and fixtures in apartment house:

4	stoves at $25.00	$100.00
4	kitchen ranges at $100	400.00
10	rugs at $25.00	250.00
4	beds with springs and mattresses at $40.00	160.00
4	tables at $25.00	100.00
4	dressers at $30.00	120.00
20	chairs at $5.00	100.00
8	sets light fixtures at $10.00	80.00
	kitchen utensils, consisting of pots, pans and dishes	230.00
4	sets of linoleum at $25.00	100.00
4	bath tubs at $35.00	140.00
4	sinks at $15.00	60.00
4	wash bowls at $15.00	60.00
4	toilets at $25.00	100.00

Cross-Examination.

Q. Your furniture in the apartment house, Mr. Goldstein, did that cost you the amount of money that you said it did or that you estimate it was worth at the time of the slide?

A. I estimated it was worth that at the time of the slide.

Q. It cost you less than that, didn't it?

A. I don't know whether it did or not. I don't know what I did pay for it.

Q. The buildings—how much did they cost you?

A. I don't remember what that was either, but I know the apartment house cost me about $8000.00.

* * * * * * *

Q. That includes the plumbing and the plumbing fixtures and everything like that?

A. Yes, sir.

Q. That took in the plumbing fixtures?

A. Yes, that is the plumbing fixtures.

Q. I don't mean furniture, I mean plumbing fixtures, bath tubs and stuff like that?

A. Yes."

Besides this there were general answers relating to all the damage, as follows:

On direct examination, after the plaintiff had testified as to the foregoing, he was asked:

"Q. Makes a total of how much?

A. $21,500.00.

Q. That is a fair estimate and valuation of the property which you lost at that time?

A. I consider it fair—yes. I don't think it could be duplicated for any less than that."

And on cross-examination:

"Q. Your estimate is based upon your best judgment as to what you think your damage was?

A. Yes, sir.

Q. You wouldn't testify that that was it or wasn't it—is that right?

A. I would not.

Q. That is true of the other things you have spoken of?

A. It is."

Argument.

The errors assigned raise the question of the sufficiency of the defendant in error's testimony on the

amount and extent of damages. The damages claimed by the defendant in error consist of injury to buildings, and for loss or injury to a stock of goods, and furniture and fixtures.

As to the measure of damages for injury to buildings there seem to be three rules for ascertaining the amount.

First—The difference in value of the land with the buildings before and after the injury.

Second—The diminution in fair and reasonable value of the building.

Third—The cost of repair.

Sutherland on Damages, Third Edition, page 2967;

Thompson on Negligence, Volume Four, page 1262;

Sedgwick on Damages, Section 170.

In the case at bar no one of these rules seem to have been followed. There is no evidence offered to bring it within the first rule, since there is no evidence of the value of the land, together with the buildings, either before or after the injury.

Under the second rule it would be necessary to show the condition of the buildings before and after the injury and place all the facts in relation thereto before the jury so that the jury could form an opinion as to the amount of diminution. Under this rule it might be proper to prove the original cost of the buildings injured or destroyed provided the facts as to its condition before and after the injury

were also shown to the jury. The cost alone would not be sufficient unless the buildings were totally destroyed and were new and had not been depreciated by use or time.

Likewise under the third rule the cost of repairs can be considered, but the facts as to the condition of the building before the injury and after the repairs are made must also be placed before the jury, so that these facts may be considered together with the cost of repairs.

In the case at bar the evidence consists of mere estimates placed upon the injury or loss by the person interested and by him alone, and these estimates or opinions stand alone and are not supplemented by any facts.

The measure of damages for the loss of the stock of goods would be the fair market value of the goods in Juneau—what they would bring in Juneau at the time of the loss; that is to say, the price that was being paid by the public generally when they were purchasing like merchandise. The same rule would apply to the household goods, provided that household goods were freely traded in at the time and place, and since there is no evidence in the record to the effect that household goods of like character were not freely traded in in Juneau, and that there was no market value for the same, we must presume that there was a market value. In any event the evidence as relating to the merchandise lost or injured was given as a mere guess with-

out furnishing any facts or data in regard to the same. No inventories were offered of the stock of goods taken before or after, or before and after, nor was there any data whatsoever furnished as a basis for the estimates made.

In the case of the furniture and fixtures in the apartment house, a list of articles was furnished. The testimony is, that it was estimated on what it was worth at the time of the slide. How this estimate was made—whether it was from market value or whether the furniture had a particular value to the owner the record does not show. The testimony shows that the apartments were built in 1913 or 1914 and that the witness does not know whether or not the original cost of the furniture and fixtures was more or less than the amount of the estimate. The testimony further shows that the fixtures, consisting of bath tubs, sinks, toilets and wash bowls, had been included in the cost of the apartment house.

In Illinois Cent. R. Company v. Elliott, 82 S. 585, the plaintiff recovered a judgment for injury caused by water escaping from defendant's tank which damaged plaintiff's house.

In regard to damages the court say:

> "The measure of damages to the real property is the difference between the value of the property immediately prior to and immediately after the injury * * *.
>
> "The oral charges of the court excepted to:
>
> 'The measure of damages, if you find for the plaintiff in this case, would be the differ-

> ence between the value of the house and lot just prior and the value of it just after the injury, and whatever the injury was to the goods, wares, merchandise and property contained in the house, and whatever the proof shows it cost to repair the house after the injury', was erroneous. Had the last clause, 'and whatever the proof shows it cost to repair the house after the injury', been omitted, the charge would have been free from error."

In Byrne v. Combria & Company Ry. Co., 68 Atl. 672, an action for damages to mill, $2000.00, and for future damages, $2000.00. Verdict for $3365.83. Plaintiff and another estimated these damages in a lump sum of $4000.00, to which defendant excepted. The court say:

> "The general rule is thus stated in 12 Am. & Eng. Ency. of Law, 2nd Ed., 460, 461: 'On damages, as on other subjects of expert opinion evidence, the opinion of witnesses must not be speculative or conjectural, but must be based upon facts or conditions existing and proved. Thus in any action of that kind the plaintiff cannot answer naked questions as to the amount of damages sustained by him.' And in 3 Elliott on Evidence, Sec. 2006, we find the statement that: 'The authorities with few exceptions are agreed upon the proposition that witnesses cannot give their opinion as to the quantum of damages in any given case. * * * The general rule is that witnesses must state facts and are not permitted to give their opinion on such facts. Nor can they give inferences or deductions drawn from them. These rules apply almost without exception to the granting of damages resulting from any act. So the rule is that a witness cannot be examined in such a manner that his answer will relieve the jury

from considering and determining the facts submitted.' In the present case we do not find any evidence fixing the amount of damages, except that of the two witnesses referred to, who gave it as a lump sum of $4000.00. Neither witness gave the basis or items upon which his estimate was formed, and the sum named is the same as set forth in statement of claim. Judgment reversed."

In American Coal Briquetting Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 170 N. W. 570. (Supreme Court of North Dakota, Nov. 30, 1918. On petition for rehearing, Jan. 8, 1919.) (Destruction of buildings by fire.)

Per CURIAM. Plaintiff has petitioned for a rehearing. Much of the petition is devoted to criticisms of certain expressions contained in the majority opinion. Leaving philological questions on one side, the basic reasoning announced in all of the former opinions is the same, viz: That there was no legally sufficient evidence as to value to sustain verdict for the amount returned by the jury in this case. And we are still of the opinion that this holding was correct.

Plaintiff called only one witness, one Wright, to testify to the value of the building. On direct examination he testified, in response to leading questions, as to the value of the property. On his cross-examination it was developed that his former testimony was in fact not as to the value, but as to the original cost of construction. No reasonable man can read Wright's testimony and arrive at any other conclusion.

(2, 3.) Plaintiff contends that, inasmuch as there was no objection to Wright's testimony when it was offered, it became competent evidence, and must be so considered. The rule

sought to be invoked is well established, but it does not go to the extent contended by plaintiff. While the failure to object may constitute waiver of the incompetency of the evidence, 'it is not a waiver of the right to question its legal effect or its legal sufficiency'. 9 Ency. of Evidence, 113. In the case at bar the legal insufficiency of the evidence did not become apparent until the witness was cross-examined. The plaintiff had the burden of proof. It was required to sustain this burden of proof. It was required to sustain this burden of substantial evidence legally sufficient to warrant reasonable men in arriving at certain conclusions. State Bank v. Bismark E. & I. Co., 31 N. D. 102; 153 N. W. 459. In the case at bar the evidence adduced by the plaintiff, in our opinion, showed the cost of construction of buildings, and not their value at the time of destruction or anywhere near that time. There was undisputed evidence showing the deteriorated condition of the buildings at the time of their destruction. The evidence offered by the defendant was to the effect that the buildings at the time of their destruction were of far less value than that fixed by the jury in their verdict. Hence we were and are of the opinion that the verdict as returned has no substantial support in the evidence, and that the jury erred in its decision of the facts. Kinney v. Brotherhood Am. Yeomen, 15 N. D. 21; 106 N. W. 44. The defendant specifically assailed this decision by a motion for a new trial. In such motion he specified particularly that there was no competent evidence showing the value of the property destroyed to be more than $750.00 in all. The court denied a new trial. But, inasmuch as there was no substantial and legally sufficient evidence in support of the verdict as returned, the trial court should have set aside

the verdict and ordered a new trial. 29 Cyc. 832-835.

Rehearing denied."

In Watson et al. v. Longhram, 38 S. E. 82, Longhram sued Watson & Powers for damages for the loss of certain jewelry which she alleged was stolen from her while a guest of the hotel kept by the defendants. There was a verdict for plaintiff. Motion for new trial having been overruled, the defendants excepted and appealed. The court say:

> "While in our opinion the evidence demanded a finding that the defendants were liable, we do not think there was sufficient proof of the market value of the property lost to authorize the verdict rendered by the jury. The measure of plaintiff's recovery was the market value of the property at the time it was lost, to which interest could have been added and included in the total sum of damages allowed. In Oliquot v. Champagne, 3 Wall. 114, 18 L. Ed. 116, the trial judge charged the jury as follows: 'The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such price as dealers in the goods are willing to receive and purchasers are made to pay when the goods are bought and sold in the regular course of trade. You will perceive, therefore, that the actual cost of the goods is not the standard'. This charge was approved by the Supreme Court of the United States. The plaintiff in her petition set out a list of the goods alleged to have been lost, with the value of each. The verdict was the exact valuation of the jewels alleged in the petition. The only evidence as to the value of some of them was the price at which they had been purchased,

and some of the most valuable of them had been purchased many years prior to the loss. While the cost of property may be considered, in connection with other facts, in determining its value, evidence of the cost without which is not sufficient proof of its market value. In arriving at the amount of their verdict the jury was clearly controlled by the price paid for some of these jewels, and not by their market value at the time when the loss occurred, and although the evidence on the plaintiff showed that the value of a pair of bracelets at the time of the loss was ten per cent less than the price paid for them, which was $1600.00, the jury evidently estimated their value at the purchase price. As the evidence failed to definitely show the market value of the property at the time the loss occurred, a new trial must be granted."

In Schwartz v. Schendel, 53 N. Y. Supplement 829, only testimony touching the nature and extent of the damage was given by husband of plaintiff:

"Q. Did the water coming from the defendant's premises do any damage to any of the goods belonging to the plaintiff in the cabin?

A. Yes, sir; quite considerable.

Q. What was the value of the goods damaged?

A. I have given the value of the goods, at a rough estimate, $200.00, but they were worth, that is, the market price of the goods was more than that, and it costs us more than that.

Q. Was that the price it would cost to replace the goods on the day in question?

A. Yes, sir.

As the nature and quantity of the goods, the extent of the injury thereto, if any, and the kind of business the plaintiff was engaged in, and the husband's connection therewith, if any,

were not shown, the former was entitled, at most, to recover nominal damages only for the alleged overflow."

In Wagner v. Conway et al., 78 N. Y. Supp. 420. Potatoes destroyed. Evidence of value and amount of seed potatoes, and evidence that defendant Conway said that the potatoes were worth $150.00.

"While the significance of this phrase is not obvious, its use certainly shows that the witness did not intend to testify as to the market value generally or in the locality where the trespass was committed. In view of the paucity of proof on the question of value, we think that counsel for the defendant was right in insisting that there was not sufficient evidence on the subject upon which to base a finding; and it is difficult to resist the conclusion that in assessing the damage at $200.00 the jury indulged in mere speculation and guesswork. It is to be observed that there was no testimony whatever as to the number of bushels of potatoes which the land would have produced if left undisturbed.

On account of the insufficiency of the proof on the question of damages, a new trial ought to be granted."

In Glass v. Hauser, 78 N. Y. Supp. 830, the court say:

"But the trial Justice, upon seemingly insufficient evidence therefor, rendered judgment in favor of plaintiff for $263.05. The plaintiff testified in one breath to $380.24 and in the next to $363.05 as to the value of the goods and later to $328.24 as their cost.

Q. Was the value at the time you bought the same as they are now?

A. Before they were a little more valuable.

Q. Did they grow any less in value from the time that you delivered them to the defendant until now?

A. Now they are worth less money.

Q. At the time you did ask them for it they were worth the same?

A. Yes.

This, with the other statements by the plaintiff, may not be said to furnish a basis for the amount of the judgment as rendered. For this reason the judgment should be reversed."

In Brooke v. Cunard S. S. Co., Lim., 93 N. Y. S. 369, plaintiff recovered judgment of $200.00 for loss of baggage. Appeal raised question of sufficiency of evidence of value of articles lost.

"There was no proof of the value of any of the goods lost. The plaintiff, who was the only witness in his own behalf, testified that he based his opinion of their value upon the prices paid for them, and gave specific testimony of the cost of but three articles (a winter suit, a fur-lined winter coat and a fur hat) out of some thirty different items. It is plain that such proof will not support a judgment. It is true that the price paid for articles when new furnish some evidence of their value at the time of their loss, when their age and condition are described (citing Hanover v. Bill, 141 N. Y. 140; 36 N. E. 6), but, with the exception mentioned, there was no evidence in this case as to the age or condition of the lost articles, nor as to their cost price. Judgment reversed for reason mentioned."

In Walsh v. New York City Ry. Co., 93 N. Y. Supp.:

"The item of damage is supported only by evidence of the cost of the articles and their

condition after the accident and without any proof of their reasonable value or the wear to which they have been subjected, their condition before the accident, or of any of the details which would have enabled the jury to determine how much they had depreciated. This failure of proof defeats the judgment."

In Lee et al. v. Callahan, 84 N. Y. Supp. 167, action for damage for loss of horse:

"They recovered judgment for their loss in which an important item was the value of the horse, as to which no evidence was given except the statement by one of the plaintiffs, who does not appear to have ever bought an animal, and of the other that he had paid $65.00 for it a year and a half before and that he did not know what was its market value.

Much of the evidence might or should have been excluded upon proper objection. The defendant's motion, however, at the close of the case to dismiss the complaint for failure to show facts constituting a cause of action, is sufficient to require reversal of the judgment founded upon an arbitrary judicial estimation of the value of the horse. Judgment reversed. All concur."

In Whitmark v. Lorton, 8 N. Y. Supp. 480, the court say:

"The trial judge erred, however, in awarding more than nominal damages to the plaintiff. There is no proof of the value of the sewing machine for the conversion of which the action was brought; and in the absence of proof of value nominal damages only are recovered. Connors v. Meir, 2 E. D. Smith 312. It is true that plaintiff testified that she paid $49.00 to one Tuckeman on account of the purchase price of the machine, but proof of what plaintiff has paid or agreed to pay for the thing alleged to

have been wrongfully converted is not proof of its value. Judgment should be reversed."

In St. Louis Southwestern Ry. Co. v. Miss., 84 S. E. 281, action for damage to household goods caused by fire due to defendant's negligence:

> "While the cost of property is admissible as a circumstance tending to show value at the time of destruction, we do not think it is sufficient, standing alone, to furnish the jury a basis for a verdict."

In St. Louis I. M. & S. Ry. Co. v. Law, 57 S. W. 259, plaintiff recovered judgment for destruction of cattle at Portland. The only evidence of damage as to this item was that plaintiff testified he considered the cattle (112) were damaged $3.00 per head, and further said: "I considered they were damaged that much", and testified that 206 head were damaged $1.50 per head. The court say:

> "This was all the evidence adduced to show the damage mentioned, and it is clearly incompetent, for it is not as a general rule permissible for a witness to estimate the damages or property loss sustained by the doing or omission to do a particular act. The damage in quantum was the precursory injury the plaintiff suffered on account of the unreasonable delay at Portland. We do not know what elements entered into his estimate of the same. * * * This is one of these cases in which there is no room to estimate damages except in one way. Hence the greater reason for confining witnesses to a statement of facts and allowing the jury to estimate the damages under proper instruction of the court. The jury should have been left to determine the dam-

ages according to the facts, uninfluenced by the opinion of the interested witnesses."

Carmen v. Montana Cent. Ry. Co. (Mont.), 79 Pac. 690, was an action for damages resulting from the wrongful killing and injuring of cattle. One of the questions before the court was whether the evidence upon the question of damages was sufficient to justify the verdict. In course of the opinion it is said:

"But again, there is no competent testimony in the record as to the amount of damages sustained by plaintiff. Three animals were killed and three injured, one of which afterward died. Plaintiff was the only witness upon the question of damages, and he failed to testify directly or clearly as to the amount of his damages. He was not asked as to the amount of his damages, but simply as to the value of the animals killed and injured. He does not give the damages he sustained to the cattle which were injured and not killed, and his testimony as to the value of the cattle killed is also very indefinite, as shown by the following questions and answers:

'Q. What would you place the value of these animals—taking all those that were injured and killed, what would you place the damage at—the value?

A. I wouldn't have sold them for near the amount of money I put them in for.

Q. Well, $240.00?

A. I wouldn't take that for them no day in the week.

Q. Well, tell the jury what they were worth, so we can get the testimony.

A. They were worth to me probably more than they would be to most anyone else, because I had only a small herd, and I was trying to

grade them up to get as good a herd as I could, but I put them in for $250.00.

Q. Were they worth that to anybody?

A. Yes; that's my opinion.'

Plaintiff's damages for the cattle which were killed would have been their market value at the time of the killing, with interest thereon, but his damages for the cattle injured could not be fixed by the same rule. We do not think this testimony was sufficient to go to the jury at all. The burden was upon plaintiff to show with reasonable certainty what loss he had sustained, and to show that amount as definitely as possible. Mining Co. v. Freckleton (Utah), 74 Pac. 652. It left the matter of the amount of damages sustained by plaintiff entirely to conjecture by the jury, and no verdict for the amount rendered could be sustained which had been arrived at upon this testimony. The amount of damages which plaintiff is entitled to recover should not be left to conjecture."

In McGillvray v. Hampton, 179 Pacific 733 (District Court of Appeal, Second District, Division 1, California, Feb. 13, 1919), the court say:

(4, 5.) "As to the finding of the court that the hay destroyed had a market value of $8 per ton, we have searched the record in vain to find evidence to support it. None of the testimony placed the value at a greater sum than $8 for baled hay, one witness stating that it was worth '$8 or $9'. The cost of baling was proved to be $1.75 per ton. The price of $8 per ton as fixed by the trial judge for unbaled loose hay is not supported by a word of testimony. We were much puzzled to understand how the court could have arrived at the figure stated in its findings as to the ton price of hay until we read in the transcript a statement of the remarks of the judge in summing up his conclusions;

and after we had read that statement we were more surprised than puzzled. We quote the dialogue between the court and the counsel:

'Mr. CLAYSON. You are establishing the value of $8 for unbaled hay?

The COURT. I think so. Of course, when a witness testifies as a matter of opinion he is giving himself more leeway than when he testifies to a fact. He is simply giving his opinion, and when he testifies there is a little bias in favor of the side that calls the witness, and that is invariably noted by the courts in hearing the testimony of such witnesses. Of course, this is not a part of the record, but hay has been very high in this country for two or three years, hasn't it? Any hay would command a pretty good price. Is that true? I think $8 is probably—the lady puts the value at how much?

Mrs. MCGILLVRAY. I was offered $8.

The COURT. $8.00 will do for the time being until I am reversed by a high court.'

The statement of Mrs. McGillvray, volunteered in answer to the court's question, referred to no particular time, but her testimony given earlier in the trial showed that the only offer of a higher price than $8 for baled hay received by plaintiff was after the fire occurred —how long does not appear. We regret exceedingly in this case to be compelled to verify the prophecy of the trial judge by ordering a reversal of the judgment, especially for the reason that the amount involved is small and much delay has been occasioned by the protracted course of this litigation over a few tons of hay. If we were authorized to modify the judgment, we would adopt that course; but the error complained of goes to a finding of a fact which we have not the power to revise.

The judgment appealed from is reversed.

We concur: Conrey, P. J.; Shaw, J."

In Johnson v. Levy (Cal.), 86 Pac. 810. This was an appeal from a judgment awarding the plaintiff $300.00 as damages for the wrongful taking and detention of the possession of a livery stable. It was held that the evidence was not sufficient to support the finding upon which the judgment was based. In passing upon this question the court say:

> "The findings relating to rental value and damages are not supported by the evidence. While there is some vague and unsatisfactory evidence tending to show that the value of the rents, issues and profits was $60.00 per month, there is no evidence whatever tending in the remotest degree to show that the rental value amounted to that or any other sum. The evidence touching damages lacks every element of certainty. It consists solely of the guess or reasons for the guess. Both the direct and cross-examinations of the plaintiff, and even this is not supported by data or particulars, demonstrates that he had no personal knowledge upon which to base an estimate, and the information derived from others was of the most general and indefinite character. It is well settled that such evidence will not support a finding as to damages."

In Hatch Bros. Co. v. Black et al. (No. 884), 165 Pacific Reporter, page 520, the court say:

> (6, 7.) 3. "It is contended that there was no competent evidence of the amount of damages, if any, suffered by defendants. The evidence consists of testimony that the crops for the years 1912, 1913, and 1915 were damaged. We fail to find any evidence of the value of the crops for 1912. For 1913 the defendant Joseph Black testified that he estimated the crop for that year at 700 bushels of grain, while on

practically the same ground in 1914 they had 1800 bushels; but there was no evidence of the value of the grain other than his statement that the damage to the crop was $500. For 1915 he testified that the damage to the grain was $700; that they had a good prospect for a crop. How a jury could arrive at the correct measure of damages from the evidence we are unable to see. The measure of damages for injury to, or destruction of, crops is the value of the crops in the condition they were in at the time and place of the injury or destruction. Lester v. Highland Boy Gold Mining Co., 27 Utah 470; 76 Pac. 341; 101 Am. St. Rep. 988; 1 Ann. Cas. 761; Teller v. Bay and River Dredging Co., 151 Cal. 209; 90 Pac. 942; 12 L. R. A. (N. S.) 267; 12 Ann. Cas. 779, and note. The amount of such damages is for the jury to determine from the facts proven, and not from the opinion of the parties or witnesses. 'The reason for this rule is that it is the province of the jury to estimate the damages upon the facts as shown by the evidence, and the only end accomplished by the admission of such opinions and conclusions is the substitution of witnesses for jurors and of theories for facts. 4 Enc. of Evidence, 12 et seq., and cases there cited."

In Warshawsky et al. v. Dry Dock E. B. & B. Co., 86 N. Y. Supp. 748, the court said:

"The son of one of the plaintiffs, who was called to testify as to the repairs done to the wagon, was not qualified as to the reasonable value of the necessary repairs, and his testimony as to the cost alone was insufficient."

In Vokmar v. Third Ave. R. R. Co., 58 N. Y. Supp. 1021, the court said:

> "The plaintiff testified specifically as to what parts of the coach suffered in the collision, and how much he paid for each item of repair. But, beyond the mere fact of the amount paid, there was no evidence of the value of the repair, or that the sums actually expended were either reasonable or necessary."

Hays v. Windsor, 62 Pac. (Cal.) 395, was an action of replevin. Judgment was for the defendants and the court awarded them damages for the wrongful taking and detention of the property under the writ of replevin. One of the questions presented was whether the evidence was sufficient to support the finding of the court upon the question of damages. The portion of the opinion relating to this matter reads as follows:

> "The court awarded $175.00 to defendant Ewell Windsor, and to defendant Alice Windsor $125.00 as damages, and gave judgment accordingly. Ewell Windsor claimed in his answer $250 for counsel fees, which he testified he had agreed to pay his attorney for services in this case, and he also claimed $100 for 'trouble and expense' and for 'time consumed in the pursuit' of the property. Alice Windsor employed the same attorney and claimed for his services the sum of $100 and also $100 'as special damages for the wrongful taking and detention of the property'. In support of his claim for these items, Ewell Windsor testified to an agreement to pay the above amount to his attorney, and as to the other item he testified: 'I have lost a good deal of time, have been deprived of the possession of the crop, and have been delayed in the payment of my debts, and I think I have been damaged in that regard at least $100.' Mrs. Windsor testified to the employment of the attorney, and her liability to

pay him $100.00, and claimed 'further damages by delay and trouble in the further sum of $100'. This was all the evidence on these questions.

Appellant contends that there is no evidence to support the judgment for any special damages except as to attorney's fees, and that there is no authority of law for the latter item. Aside from the question as to attorney's fees, the evidence fails to show with any certainty any damage for the pursuit of the property; at most it gives the opinion of defendants that they were damaged, but states no particulars on which the opinion is based."

This court, in the case of Boland v. Balaine, 266 Federal, page 22, in which it was urged that the evidence as to the amount of damages which was given in the way of estimates of value was speculative and visionary, and did not constitute the proper basis upon which to predicate the measure of damages, concurred in said contention.

We respectfully submit that the evidence considered according to the rules laid down in these cases is insufficient to justify a verdict in any amount; that it is for the jury to determine the amount from the facts furnished them, and that the plaintiff's opinion as to the amount of damages is an infringement on the province of the jury and not sufficient to justify the verdict, and that the cause should be reversed.

Dated, February 20, 1922.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.